

# Among the Free and Equal

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The proportion of women in the German *Bundestag* has risen steadily over the last four decades. In 1972, only every twentieth member of parliament was female. In 2013 it was one out of three. Two to one is not yet one to one, but hey: we're getting there!

Or do we? At the last general election in 2017, this progressive narrative received a blow: For the first time since 1972, the proportion of women in the German Parliament has not only stagnated but actually fallen. In the previous legislative period, one out of four conservative MPs (CDU/CSU) was a woman, now it's only one out of five. It is similar with the Liberals, even with the Social Democrats the proportion has slightly decreased, and with the new far-right AfD, the male-female ratio is no less than nine to one.

One may find all this politically deplorable – but is this also a constitutional problem? Not at all, [many say](#). Parliament is not a mirror of society! Each MP represents the people in its entirety and not a certain social group, they say. Free is his mandate, equal are his voters, and if they elect more men than women, well, that's democracy, isn't it? No one is to blame for the lack of gender parity in Parliament, they say, if not the women themselves who should fight more effectively for better list places instead of whining if they lose. The finding that there are only half as many female as male MPs is, from this point of view, constitutionally and politically neutral: representativeness doesn't and mustn't depend on the identity of the representative if Parliament is to remain the representation of the people as opposed to specific group identities.

## Parité in Brandenburg

From this perspective the moment when a constitutional problem arises is, on the contrary, when Parliament itself ventures to rectify its gender disparity by legislative means. This week, the state of Brandenburg has done so by enacting a so-called [parity bill](#): all party lists for state parliament elections will have to be filled alternately with women and men. (The original [draft tabled by the Greens](#) went even further and provided for a parity solution for district candidates as well).

Why shouldn't the legislator be allowed to do that? Whose rights could be violated? Let's see.

First, there is the male candidate's right not to be discriminated against. He can no longer run for list position #2 if list position #1 has already gone to a man. Just because he is a man!

Just because he is a man? If he weren't, would his situation be any different? I don't think it would. A woman can't run for list position #2 either if list position #1 is already taken by a woman, and the same applies to third gender persons who'd have to make a choice between both. So, a male candidate is not worse off than anyone else, is he? He *is* worse off, however, in comparison to the *status quo ante*: he can no longer do what he could before. He is not discriminated against, but restricted in his freedom. Can this restriction of freedom be justified? Article 3 (2) sentence 2 of the *Grundgesetz* states that the state promotes the "actual enforcement of equal rights for women and men" and works towards the "elimination of existing disadvantages". That is what the state is doing here, and I don't see why the restriction should be disproportional in relation to that aim.

A much trickier point seems to me to be the question if compulsory gender parity infringes upon the freedom of the parties to make up their own minds about the formation of their electoral lists. The state must not dictate to the parties what they should want, especially not with regard to whom they put up as their candidates for the election which is the very basis of the state's own democratic legitimacy. But that is what the state does with compulsory gender parity. Let's assume a party that promotes the preservation of the patriarchy and the banishment of women from the public sphere. What if that is what the party explicitly wants to be elected for? Can the state force it into self-contradiction?

The Brandenburg law stipulates that gender parity does not apply to hypothetical single-gender parties in terms of membership and representation: If you are an all-male party, then you are free to have an all-male list. But is that enough? None of the parties in Parliament, not even the far-right AfD, would position itself openly as a pro-patriarchy party. None of them would probably describe their low quota of women as deliberate and exactly the right thing to have. On the contrary, this seems to me to be a valid objection to compulsory gender parity quota in terms of constitutional policy: The gender disparity in the CDU/CSU, the FDP and particularly the AfD lists sheds light on the gap between these parties' sanctimonious words and the sobering reality. With compulsory gender parity, that gap would disappear. I am not sure if that would be a good thing.

There is one other issue that seems to receive not enough attention in the current discussion: What actually happens if, for example, a party congress delegate stands up and proposes a man for a list place reserved for a woman? The delegate's right of individual nomination, at least at the federal level, is a matter of statutory law (§ 27 (5) 1 in conjunction with 21 (3) 2 *Bundeswahlgesetz*, a norm which might be seen as problematic in terms of party freedom in itself, but that's another story). What is the party congress leadership to do in such a case? To dismiss the proposal and run the risk of having the whole election list being taken to court?

Conversely, if a party just goes ahead and puts up a gender-disparate list in violation to the parity obligation, the sanction is that the entire list will not be admitted to the election. This is what the French model does (although not on the national level, as the *Assemblée Nationale* elections are held according to the majority voting system). Once again: compulsory gender parity withdraws the highly political question of equal access of women to public offices from political dispute. The Brandenburg

AfD, for example, had not one single woman on its entire list for the 2017 federal elections. Not one! With compulsory gender parity, the AfD's attitude towards women's rights would not have changed much, probably. But it would have become a lot less visible.

## Not a mirror

What doesn't make much sense at all to me, finally, is the argument that it is Parliament itself that must be protected from such interference. Parliament is made up of members who exercise their free mandate as representatives of the entire people (Article 38 (1) 2 *Grundgesetz*). Agreed – but I don't see why MPs should exercise their mandate less freely just because they have been elected on a gender parity list. Because they would then only act or be perceived as representatives of women or men? Where is the evidence for this? The Greens have had gender parity lists for ages, so if a loss of people's representation is what gender parity brings about that should be observable. Is it? I don't think so.

The free mandate is not so much about individual MPs "representing" the entire people, whatever that means, but about holding them responsible for their doings. The way an MP votes is her own, free decision: she cannot hide behind her party, her constituency or the group she "represents". Nope – she did that, and she has to stand up for it. That is her free mandate. No matter if she was elected on a gender parity list or not.

Gender disparity in parliament seems to me to be not so much a problem of the "representativeness" of the *Bundestag* but rather an indication that we are dealing with structural discrimination in the political arena that won't go away just by appealing to the sense of duty of the decision makers – just like in the business world. Anyone who has ever attended a party conference and seen the old and young boys' networks in action has an idea of why this might be so.

The Brandenburg law is intended to amend this problem of structural discrimination. Whether or not it is politically a good idea will be for the electorate to decide at the upcoming elections in September 2019, as the the parity law will not come into force until 30 June 2020. Whether or not it is constitutional will be for the Brandenburg constitutional court to decide, hopefully before that date. And that is a good thing. One of the great and far too seldom used advantages of German federalism is that you can try things out and see what happens. From this particular experiment, I am sure that there is plenty to be learned for all sides involved.

*Many thanks to Anna von Notz who has contributed valuable input and criticism to this editorial.*

## Terror terror

The **EU** is planning a directive to take down terrorist content on the Internet. [MARTIN SCHEININ](#) sounds the alarm: The criteria of what counts as terror were developed

in the context of "existing texts concerning terrorist crimes. This creates an image of legality and foreseeability. What is, however, hidden behind that image is that algorithmic or administrative decisions to order immediate removal from the internet of terrorist content cannot, either logically or in practice, be based on criteria that have been written for being determined through the evidence-based adversarial process of a criminal trial". The draft directive, according to the former UN special rapporteur on human rights in the fight against terror, "constitutes a grave threat to freedom of expression", and its "cross-border application makes it a dreadful tool in the hands of authoritarian regimes or rogue officials".

In **China**, censorship has been imposed on many of the constitutional law textbooks used in university after an informer from within academia denounced the textbooks as anti-constitutional before the authorities. Our author, [who wants to remain anonymous](#), reports on the shrinking leeway for constitutionalism in President Xi's empire.

**Italy** has now passed a law to deprive convicted terrorists of their citizenship, too – but the Italian law, unlike its other European predecessors, is applicable to naturalized citizens only, as opposed to those born as Italians. Also, statelessness as a result is not excluded. In addition, [ARIANNA VEDASCHI and CHIARA GRAZIANI](#) point to the sinister intentions of the Salvini government with regard to humanitarian residence permits.

The **British** Parliament has backed Prime Minister Theresa May to renegotiate the Brexit deal with the EU. [JACK SIMSON CAIRD](#) explains the various options Parliament was facing.

In **Venezuela**, Juan Guaidó, elected by Parliament as interim President, is recognised by more and more governments internationally, while the incumbent Nicolas Maduro is showing no signs of ceding way. [SEBASTIÁN MANTILLA BLANCO](#) pleads for Guaidó's democratic legitimacy to be the basis for international recognition.

Our online symposium on "Eurozenship" has ended with contributions from [DIMITRY KOCHENOV](#), [OLIVER GARNER](#), [WILLEM MAAS](#) and [LIAV ORGAD](#).

## Elsewhere

[NILS NAPIERA](#) is sceptical whether the **EU** Parliament's campaign to increase voter turnout is such a good idea.

[LEONID SIROTA](#) examines a ruling by the High Court of **Australia** that declares the capping of campaign contributions an unconstitutional violation of the right to free political communication.

[SILVIA FILIPPI](#) reports on **Italy's** conviction before the European Court of Human Rights for failing to protect people living in the neighborhood of an environmentally noxious steel mill (Italian).

[ELIZABETH ADAMS](#) asks whether the long-standing dispute between the European Court of Human Rights and the **UK** over the voting rights of prisoners has now finally come to an end.

[JOSEPH WEILER](#) has a proposal on how to remove the "**Irish** backstop" obstacle to Brexit.

So much for this week. All the best, and take care,

Max Steinbeis

